Supreme Court U.S.
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No. 00-

IN THE
Supreme Court of the United States

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), the Court adopted a "dual standard" with respect to fee-shifting provisions contained in federal civil rights laws: prevailing plaintiffs in such cases are presumptively entitled to attorney fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." 434 U.S. at 421. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Court held that the *Christiansburg* "dual standard" should not be applied mechanistically to fee-shifting provisions contained in federal statutes outside the civil rights context, even when the statutory language is similar to the language at issue in *Christiansburg*. *Fogerty* held that prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of fees is warranted under the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505. *Fogerty*, 510 U.S. at 534. The question presented is:

Whether prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of attorney fees is "appropriate" under the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f), and similarly worded fee-shifting provisions of other federal environmental statutes.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court of appeals were:

(1) The Steel Company; and

(2) Citizens for a Better Environment.

Pursuant to Supreme Court Rule 29.6, petitioner The Steel Company, a/k/a Chicago Steel and Pickling Company, states that it has no parent company, and that no publicly held company holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals from which review is sought (App. 1a-20a) is reported at 230 F.3d 923 (7th Cir. 2000). The order of the district court denying Petitioner's motion for an award of attorney fees (App. 21a-26a) is not reported. Other aspects of this case were before the Court in 1998. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves the fee-shifting provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(f):

> **Costs.** The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. . . .

EPCRA's entire citizen suit provision, 42 U.S.C. § 11046, is reproduced in the Appendix at 27a-31a.

STATEMENT OF THE CASE

A. The Issue. More than 30 federal environmental statutes include provisions allowing private citizens, under certain circumstances, to bring suit against entities alleged to have violated environmental laws. The past 15 years have witnessed an "explosion" in the number of such citizen suits. Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement,* 11-SPG NAT. RESOURCES & ENV'T 20 (Spring 1997).

That explosion has been fueled in no small degree by the inclusion of a fee-shifting provision in each of the citizen suit statutes. Because federal courts have awarded attorney fees to prevailing plaintiffs in environmental citizen suits as a matter of course, a cottage industry has sprung up consisting of lawyers and affiliated environment groups dedicated almost exclusively to -- and largely financed by fees derived from -- bringing such suits. *Id.* at 21.

The attorney fee provision at issue in this case, 42 U.S.C. § 11046(f), contains language that is identical to virtually all other fee-shifting provisions in federal environmental laws. It provides that "whenever the court determines . . . an award is appropriate," the court may award "reasonable" attorney fees to "the prevailing or substantially prevailing party" in an action brought pursuant to EPCRA's citizen suit provision. Section 11046(f) and similar fee-shifting statutes are written in party-neutral terms; nothing in the language suggests that the analysis regarding whether an attorney fee award is "appropriate" should vary depending on whether the prevailing party is a plaintiff or a defendant.

Nonetheless, the only two federal appeals courts to have addressed this issue *directly* -- the Seventh Circuit in this case and the Ninth Circuit in *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091 (9th Cir. 1999), *cert. denied,* 112 S.Ct. 933 (2000) -- have held that fee awards in environmental citi-

zen suits ought to based on a "dual standard." Under that standard, prevailing plaintiffs are presumptively entitled to attorney fee awards, while a prevailing defendant is entitled to fees only if he can demonstrate that the plaintiff's suit was frivolous, unreasonable, or without foundation. That dual standard is derived from *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), which held that the dual standard ought to be applied to fee awards in suits seeking redress under the federal civil rights statutes.

Significantly, neither the Seventh Circuit nor the Ninth Circuit based its holding on any sort of detailed analysis of the environmental statutes at issue. Rather, each Court deemed itself bound to follow a 1986 decision from this Court, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), which held (the Seventh and Ninth Circuits believed) that the *Christiansburg* dual standard should be engrafted onto federal environmental statutes. App. 15a; *Marbled Murrelet,* 182 F.3d at 1095.

The Seventh and Ninth Circuits have badly misread *Delaware Valley*. That decision had nothing to do with the circumstances under which it is "appropriate" for a district court to make a fee award to a prevailing party in an environmental citizen suit and did not discuss whether a "dual standard" should be applied when making such fee-award determinations. Indeed, the Court's later decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), makes clear that it is wary of expanding the "dual standard" to fee-shifting provisions contained in federal statutes outside the civil rights context.

Such widespread confusion among the lower federal courts regarding the holding in *Delaware Valley* counsels strongly in favor of granting review in this case. Appeals courts in at least two circuits have been unwilling even to entertain arguments regarding the impropriety of applying a "dual standard" to environmental fee awards, because they

believe (erroneously) that *Delaware Valley* precludes them from doing so. That situation is likely to continue, thereby precluding any development of the law in this area, until such time as the Court addresses the issue itself.

In light of the explosive growth in environmental citizen suits, the standards applicable to fee requests from prevailing defendants is an issue that will arise with increasing frequency. That growth is being fueled to a considerable extent by the economic incentives created by the "dual standard" applied to fee awards; under that standard, potential citizen litigants have much to gain and little to lose by filing nonfrivolous lawsuits of even doubtful merit. Because at least some federal appeals courts believe that they are precluded from even *considering* whether fees should be awarded to prevailing plaintiffs and prevailing defendants on an evenhanded basis, the lower courts are unlikely -- in the absence of intervention from this Court -- to pay serious attention to the issue of whether Congress really intended to create such economic incentives. Clarification of this important issue of federal law is urgently needed.

B. The Underlying Statute. Congress adopted EPCRA in 1986 as a means of improving the emergency response capabilities of local communities in the event that excessive quantities of toxic substances were suddenly released into the environment. To ensure that local communities have the information needed to respond quickly to such events, EPCRA requires that users of specified toxic chemicals report annually on the quantity of such chemicals they possess. *See* EPCRA § 312, 42 U.S.C. § 11022. Facilities from which specified chemicals are released into the environment are required by

EPCRA § 313, 42 U.S.C. § 11023, to file annual reports detailing such releases.[1]

As the Court has noted, "Enforcement of EPCRA can take place on many fronts." *Steel Co. v. Citizens for a Better Environment* ["*CBE*"], 523 U.S. 83, 87 (1998). Congress clearly contemplated that the filing of citizen suits of the type at issue here would be but one of several methods of enforcing EPCRA. The "most powerful [EPCRA] enforcement arsenal" belongs to EPA. *Id.* It may seek criminal, civil, or administrative penalties against facilities that neglect their reporting responsibilities. 42 U.S.C. § 11045. State and local governments can also seek civil penalties, as well as injunctive relief. 42 U.S.C. § 11046(a)(2) and (c). A third enforcement mechanism, and the one at issue in this action, is a citizen suit brought by "any person" against, *inter alia*, the owner or operator of a facility that fails to file inventory forms and toxic chemical release forms required under 42 U.S.C. §§ 11022 and 11023.

Congress imposed a number of limitations on citizen suits that are not applicable to suits filed by federal officials. In particular, 42 U.S.C. § 11046(d)(1) provides that no citizen suit may be initiated against the owner or operator of a facility "prior to 60 days after the plaintiff has given notice of the alleged violation to [EPA], the State in which the alleged violation occurs, and the alleged violator." Moreover, no such suit may be filed if EPA "has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under [EPCRA] with respect to the violation of the

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[1] EPCRA itself imposes no limitations on such releases. Release of chemicals into the environment is, of course, subject to regulation under a wide range of federal environmental statutes. CBE has never alleged that The Steel Company failed to comply with any of those other statutes.

requirement." 42 U.S.C. § 11046(e). Also, while the relief available in a citizen suit includes payment of a civil penalty (42 U.S.C. § 11046(c)), such penalties are paid to the federal government, not to the individual initiating the citizen suit.

Congress also included a fee-shifting provision: a district court hearing a citizen suit brought pursuant to EPCRA "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines that such an award is appropriate." 42 U.S.C. § 11046(f). Notably, the fee-shifting provision provides no indication that fee applications from prevailing defendants and fee applications from prevailing plaintiffs are to be subject to different standards. EPCRA's legislative history provides little to no indication regarding why Congress adopted the fee-shifting provision. The language used in the fee-shifting provision is, however, substantially similar to language used in fee-shifting provisions included in environmental statutes adopted in the 15 years prior to adoption of EPCRA in 1986. Those earlier fee-shifting provisions have generally been viewed as designed to provide an incentive to citizens to file meritorious citizen suits and as an incentive to defendants in such actions to stand by meritorious defenses.

Among the private organizations that have decided to seek an active role in EPCRA litigation is Respondent Citizens for a Better Environment ("CBE"), a non-profit environmental advocacy group headquartered in Chicago. CBE has filed scores of successful suits against companies it alleged not to be in compliance with EPCRA. Citizens for a Better Environment, *Environmental Review* (Fall 1997). CBE is well equipped to pursue extensive EPCRA litigation. In 1995 when it filed this suit, CBE had over 30,000 members and 180,000 contributors. Complaint ¶ 6.

C. Proceedings Below. Petitioner The Steel Company is a small, minority-owned manufacturer and pickler of steel located in the southeast side of Chicago. Its manufacturing processes require it to inventory and release into the environment under permit and pursuant to various regulatory schemes, certain chemicals covered by EPCRA.

On March 16, 1995, CBE gave notice -- pursuant to 42 U.S.C. § 11046(d) -- to The Steel Company, the Environmental Protection Agency, and Illinois authorities that: (1) it believed that The Steel Company had violated EPCRA §§ 312 and 313, 42 U.S.C. §§ 11022 and 11023, by failing to file inventory forms and toxic chemical release forms required by those provisions; and (2) it contemplated filing suit against The Steel Company for those alleged violations. On August 7, 1995, CBE filed its complaint in the District Court for the Northern District of Illinois. It is uncontested that as of August 7, 1995, The Steel Company had filed all forms required of it by EPCRA.

The district court thereafter granted The Steel Company's motion to dismiss for failure to state a claim upon which relief could be granted; the Steel Company had also alleged absence of subject matter jurisdiction. The district court held that the EPCRA citizen-suit provision did not concern itself with historical reporting-requirement violations.

On appeal, the Seventh Circuit reversed and remanded for further proceedings. *CBE v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *vacated,* 523 U.S. 83 (1998). The court held that EPCRA authorizes citizen suits not only for failure to complete and submit forms, but also for failure to do so in a timely manner. *Id.* at 1243. The court did not address the issue of whether CBE had Article III standing and thus whether the federal courts had subject matter jurisdiction to consider the merits of CBE's claims.

In March 1998, this Court unanimously vacated the Seventh Circuit's judgment and remanded with instructions to

direct that the complaint be dismissed. *Steel Co. v. CBE*, 523 U.S. 83 (1998). Six justices held that CBE lacked Article III standing because its requested relief would not redress the injuries CBE claimed to have suffered. *Id.* at 105-09; *id.* at 111-12 (Breyer, J., concurring in part and concurring in the judgment). The other three justices stated that EPCRA does not permit citizen suits for wholly past violations and would have reversed on that ground without reaching the standing issue. *Id.* at 131-33 (Stevens, J., joined by Souter, J., concurring in the judgment); *id.* at 134 (Ginsburg, J., concurring in the judgment).

Following the district court's entry of a judgment of dismissal, The Steel Company on December 29, 1998 filed a motion pursuant to 42 U.S.C. § 11046(f) for an award of attorney fees and non-taxable expenses.[2] CBE responded to the motion by asserting that, in view of the Supreme Court's determination that CBE lacked Article III standing and thus that the federal courts lacked subject matter jurisdiction to decide the merits of CBE's EPCRA claims, the district court lacked subject matter jurisdiction to consider The Steel Company's fee request. CBE's response also asserted that the fee request should be denied for two other reasons: (1) The Steel Company was not a "prevailing party" within the meaning of 42 U.S.C. § 11046(f), because it prevailed only on a jurisdictional issue, not on the merits of CBE's EPCRA claims; and (2) a prevailing defendant in an EPCRA action is entitled to a fee award only if the lawsuit was "frivolous," and CBE's suit was not frivolous.

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[2] Before the motion was filed, the parties -- as a result of the negotiations process mandated by local court rules -- stipulated that The Steel Company's reasonable attorney fees amounted to $250,567.04, and reasonable non-taxable costs amounted to $19,641.57, for a total of $270.208.61.

In its June 8, 1999 Memorandum and Opinion, the district court held that it lacked jurisdiction to consider the fee petition. App. 21a-26a. The court held that once a federal court determines that a suit was improperly filed because the court lacks subject matter jurisdiction over the case, its authority over the parties ceases and it has no power to award attorney fees. *Id.* The court did not address CBE's other two arguments: that fees were unwarranted because The Steel Company was not a "prevailing" party and because CBE's suit was not frivolous.

In its appeal, The Steel Company requested the Seventh Circuit to address all three issues. The appeals court did so, siding with The Steel Company on the first two issues but with CBE on the third -- and thereby affirming the district court's denial of the fee petition. The appeals court held initially that the trial court erred in determining that its lack of jurisdiction over CBE's claim deprived it of jurisdiction over The Steel Company's fee petition. App. 3a-11a. The appeals court explained, "[A] court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party." App. 3a.

The appeals court next determined that The Steel Company was the prevailing party in this action. App. 11a-13a. The court said that The Steel Company should be deemed to have "prevailed" in this suit because:

> [T]he Supreme Court's decision in this case . . . terminated this suit and barred all others like it, for as long as [EPCRA] retains its current language. It was a triumph in the war, not just in a battle or even a campaign.

App. 12a.

The appeals court nonetheless affirmed the district court's decision because it determined that prevailing EPCRA defendants may not obtain fee awards under § 11046(f) unless they can show that "the suit was frivolous, unreasonable, or

pursued in bad faith." App. 15a. The court held that The Steel Company failed to meet that standard: "Misconceived this suit was. Frivolous it was not." *Id.* The court explained that its adoption of a "frivolous, unreasonable, or pursued in bad faith" standard was mandated by this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). *Id.*

According to the appeals court, *Delaware Valley* held that issues arising under environmental fee-shifting laws in all instances should be treated "in the same manner" and "should be governed by the same principles as fee shifting under [civil rights laws]." *Id.* at 14a. Because this Court held in *Christiansburg* that a dual standard should be applied in civil rights cases and that prevailing defendants in such cases should be awarded fees only when the suit was frivolous, unreasonable, or pursued in bad faith, the appeals court felt itself bound by *Delaware Valley* to apply that same standard to environmental cases. *Id.* at 15a. The appeals court concluded, "Until the Supreme Court suggests otherwise, this court must read 'in the same manner' to mean just that." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the thousands of businesses that each year find themselves the target of citizen suits filed under the federal environmental laws: under what circumstances are they permitted to recover their attorney fees when they prevail in such cases? According to the Seventh Circuit, the answer to that question is, "virtually never." If that answer is correct, companies will continue to be placed under enormous pressure to settle such suits by succumbing to the plaintiffs' financial demands -- regardless how lacking in merit they judge a lawsuit to be.

Yet, the Seventh Circuit arrived at its answer without examining The Steel Company's arguments. The Seventh

Circuit stated that its answer -- that prevailing defendants in environmental citizen suits may recover fees only where the suit was "frivolous, unreasonable, or pursued in bad faith" -- was mandated by this Court's precedent. The only other appeals court to address the issue directly, the Ninth Circuit, deemed itself similarly constrained by this Court's precedents. *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091 (9th Cir. 1999), *cert. denied*, 112 S.Ct. 933 (2000).[3]

As The Steel Company will demonstrate below, the Court's precedents impose no such constraints; the Court has never previously considered whether courts should apply a dual standard or an evenhanded standard in fee requests arising under federal environmental statutes. But because, for whatever reason, the appeals courts do not feel at liberty to address the issue themselves, this Court is the only possible source of guidance on the issue.[4] That guidance is urgently needed, both because of the large increase in environmental citizen suits in recent years and because application of a dual standard to fee-shifting issues has transformed such suits from the supplemental enforcement mechanism envisioned by Congress into a shakedown system under which companies must pay tribute to environmental groups as a cost of doing business.

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[3] Indeed, prior to *Delaware Valley*, the Ninth Circuit had adopted an evenhanded standard for awarding fees in environmental citizen suits. *Carson-Truckee Water Conservancy Dist. v. Secretary of Interior*, 748 F.2d 523 (9th Cir. 1984), *cert. denied*, 471 U.S. 1068 (1985). *Marbled Murrelet* held that *Carson-Truckee* had been overruled *sub silentio* by *Delaware Valley* and thus was no longer good law within the Ninth Circuit. *Marbled Murrelet*, 182 F.3d at 1095.

[4] Indeed, the Seventh Circuit appeared to invite the Court's intervention, stating that it would apply *Christiansburg*'s dual standard to environmental fee-shifting statutes "[u]ntil the Supreme Court suggests otherwise." App. 15a.

I. THE APPEALS COURTS ARE UNDER THE MISTAKEN IMPRESSION THAT *DELAWARE VALLEY* DIRECTS THEM TO APPLY THE *CHRISTIANSBURG* DUAL STANDARD IN ENVIRONMENTAL CITIZEN SUITS

Review of this case is warranted because the federal appeals courts have been confused by this Court's decision in *Delaware Valley*. The appeals courts have interpreted *Delaware Valley* as precluding them from considering any arguments against application of the *Christiansburg* dual standard in environmental citizen suits. That misinterpretation has prevented the appeals courts from examining the significant differences between federal laws authorizing individuals to sue to enforce civil rights statutes and laws authorizing citizen suits to enforce federal environmental laws.

Delaware Valley provides no support for a dual fee-award standard and never even discussed awards to prevailing defendants. The case involved an effort by prevailing plaintiffs in a Clean Air Act citizen suit (brought pursuant to § 304(d) of the Act, 42 U.S.C. § 7604(d)) to recover attorney fees. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The district court's decision that the plaintiffs were entitled to a fee award was not before this Court; the case dealt solely with the proper size of the award.

One issue before the Court was whether the district judge erred in awarding fees to the plaintiffs for work done in post-trial administrative proceedings. The Court rejected arguments by Pennsylvania that fees incurred in administrative proceedings were not properly awardable because such fees were not "costs of litigation" within the meaning of § 304(d) of the Act and were not part of the "action" for which fees were awardable. In arriving at that conclusion, the Court explained, "[T]he work done by counsel in these two [post-

trial] phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." *Id.* at 558. The Court added, "In a case of this kind, measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the matters upon which Delaware Valley prevailed in securing the consent decree." *Id.* at 558-59.

Only after determining that post-trial administrative work was indistinguishable -- for fee-award purposes -- from work performed at trial did the Court look for support to case law decided under civil rights fee-shifting statutes. The Court noted that several cases decided under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, held that prevailing civil rights plaintiffs are entitled to recover, as part of their "reasonable" fee, time devoted to the post-judgment monitoring of a consent decree. *Id.* at 559. The Court said that those cases supported its view that the respondent was entitled to recover fees for its post-trial work. The Court said, "Given the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Id.* at 560.

The Seventh Circuit seized upon *Delaware Valley*'s use of the phrase "in the same manner" to rule that it was bound by that decision to apply *Christiansburg*'s dual standard to fee requests in environmental citizen suits. App. 15a. Its conclusion in that regard was wholly unwarranted. We note initially that, contrary to the appeals court's conclusion (App. 14a), *Delaware Valley*'s discussion of similarities between civil rights suits and environmental citizen suits was purely *dictum*. The Court did not begin that discussion until after it had rejected Pennsylvania's argument that work performed by Delaware Valley in post-trial administrative proceedings could

be distinguished meaningfully from work performed in the trial court. *Id.* at 557-59.

More importantly, nothing in *Delaware Valley* suggests that the Court had examined all of the purposes of civil rights fee-shifting statutes and determined that they were identical to all of the purposes of environmental citizen suit fee-shifting statutes. Rather, the Court merely determined that they shared at least one common purpose: to encourage citizens to bring meritorious suits that they might not otherwise be in a position to bring. *Id.* at 560-61. In particular, the Court did not discuss Congress's purpose in permitting prevailing civil rights and environmental *defendants* to obtain fee awards in "appropriate" cases.

Accordingly, the Court's decision to supply a uniform interpretation to environmental and civil rights fee-award provisions in this single instance says nothing about whether the Court would also provide a uniform interpretation in the totally unrelated context of fee requests by prevailing defendants. Such fee requests raise a significantly different set of considerations. As we demonstrate below, the purposes underlying fee-shifting provisions in environmental statutes are different in several key respects from the purposes underlying civil rights fee-shifting provisions. Nothing in *Delaware Valley* suggests that the Court intended to prohibit Courts from taking those differences into consideration when determining the proper standards for awarding fees to prevailing defendants.[5]

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[5] *Delaware Valley* returned to the Court a second time in 1987, when it was asked to determine the circumstances under which fees could be awarded at a rate above the "lodestar fee" (*i.e.*, the fee determined by multiplying the attorneys' reasonable hourly rates times the number of hours reasonably devoted to the case). *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley II*], (continued...)

Both the Seventh Circuit and the Ninth Circuit clearly misread *Delaware Valley* and *Delaware Valley II* when they determined that those decisions require them to apply the *Christiansburg* dual standard to fee requests from prevailing defendants in environmental cases, without regard to the differing purposes underlying civil rights fee-shifting statutes and fee-shifting statutes in environmental citizen suits. The Court should grant review in order to correct that error and to make clear that it has not foreclosed lower courts from taking such differences into consideration.

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[5](...continued)
483 U.S. 711 (1987). Before addressing that issue, the Court said the following in a footnote at the end of the initial paragraph of its decision:

> Last term in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) [of the Clean Air Act] the courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988, which provides that in the actions specified in that section "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Delaware Valley II, 483 U.S. at 713 n.1. Although the remainder of the Court's discussion of the fee "enhancement" issue includes several citations to civil rights cases, there is no indication in *Delaware Valley II* that any of those cases played a decisive role in either the plurality opinion or the concurring opinion. Nor is there any indication that either party thought that differences between fee-shifting provisions under environmental laws and fee-shifting provisions under civil rights laws were relevant to the fee "enhancement" issue before the Court. Accordingly, *Delaware Valley II*'s extremely brief discussion of what *Delaware Valley* had said about parallels between environmental citizen suits and private suits brought under civil rights laws cannot be deemed to have created any new law.

II. THE SEVENTH CIRCUIT ERRED IN ADOPTING A DUAL STANDARD IN DETERMINING WHETHER AN AWARD OF FEES IS "APPROPRIATE" UNDER § 11046(f)

A. The Plain Language of § 11046(f) Indicates That Defendants and Plaintiffs Are To Be Treated Alike with Respect to Fee Petitions

The most basic issue that a court must face in addressing a fee petition is whether the standards for making an award differ depending on whether the prevailing party is a defendant or a plaintiff. The plain language of § 11046(f) makes clear that the answer to that question is *no*, it makes no difference -- the same standards ought to come into play in making a fee determination whether the prevailing party is a defendant or a plaintiff. Section 11046(f) provides that "costs of litigation (including reasonable attorney and expert witness fees)" may be awarded to "the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." Congress's use of the term prevailing "party" is an unmistakable indication that Congress intended to permit fee awards to prevailing defendants and plaintiffs alike. Moreover, the standard established by Congress for such awards is precisely the same for *all* prevailing "part[ies]" -- such awards are called for whenever the district judge determines that "such an award is appropriate."

Despite the plain language of § 11046(f), the Seventh Circuit nonetheless adopted a dual standard in EPCRA fee-award cases. App. 15a. The appeals court did so without examining the language of § 11046(f). Rather (as noted above), the appeals court held that a dual standard was mandated by *Delaware Valley*. The Court should grant review to correct the Seventh Circuit's clear error of federal statutory interpretation. Review is particularly warranted

because this issue is one that will recur with increasing frequency, in light of the increasing number of environmental citizen suits being filed in the federal courts.

The appeals court's decision is inconsistent with a recent decision of this Court involving the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. § 505. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), a songwriter prevailed in a copyright infringement suit brought against him. Applying the *Christiansburg* dual standard, the lower courts denied the songwriter's subsequent attorney fee request.

This Court unanimously reversed, finding that the Copyright Act required fee petitions from prevailing defendants and fee petitions from prevailing plaintiffs to be placed on equal footing. *Id.* at 534.[6] In arriving at that conclusion, the Court focused principally on the language employed in the Act's fee-shifting provision:

> The statutory language -- "the courts may also award a reasonable attorney's fee to the prevailing party as part of the costs" -- gives no hint that successful plaintiffs are to be treated differently from successful defendants.

Id. at 522.[7] The language employed by § 11046(f) is identical in all relevant respects to the language employed by the Copyright Act's fee-shifting statute; in each case, the statute "gives no hint that successful plaintiffs are to be treated differently from successful defendants." Accordingly, *Fogerty*

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[6] The Court referred to that standard as an "evenhanded standard," and a standard that gives preference to prevailing plaintiffs over prevailing defendants as a "dual standard." *Id.* at 534 & n.19. The Steel Company employs that same terminology herein.

[7] The Court indicated that district courts would be afforded considerable latitude in the factors they consider in making fee awards, "so long as such factors are faithful to the purposes of the Copyright Act and *are applied to prevailing plaintiffs and defendants in an evenhanded manner.*" *Id.* at 534 n.19 (emphasis added).

mandates that § 11046(f) be interpreted as adopting an "evenhanded standard," whereby The Steel Company's fee petition is to be treated no differently than if The Steel Company had happened to be a prevailing plaintiff. The Court should grant review in order to resolve the conflict between *Fogerty* and the decision below.

B. *Christiansburg*'s Dual Standard Is Inapplicable in This or Any Other Environmental Case

The Court has adopted a dual standard in civil rights cases: prevailing plaintiffs in civil rights cases are presumptively entitled to fee awards, while prevailing defendants are entitled to fees only if they can demonstrate that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421. Moreover, the Court has done so based on fee-shifting provisions whose language is virtually identical to the provision at issue in *Fogarty* and to the fee-shifting provision contained in nearly every environmental statute. This case ultimately boils down to the following issue: should construction of fee-shifting provisions in EPCRA and other environmental statutes be guided by *Christiansburg* or by *Fogerty*? The Steel Company respectfully submits that this case has far more in common with *Fogerty* than with *Christiansburg* and thus that application of an evenhanded fee standard is appropriate. Review is warranted in order to resolve this important issue, an issue that this Court has not previously addressed.

In declining to expand the *Christiansburg* dual standard outside the context of civil rights cases, *Fogerty* acknowledged that the Copyright Act fee-shifting provision is nearly identical to the fee-shifting provision contained in virtually all civil rights statutes. The Court gave two reason for its decision not to apply *Christiansburg* in Copyright Act cases.

First, it determined that the legislative history of the civil rights statutes indicated that Congress intended to create a dual standard for fee awards, while no such indication appeared in the Copyright Act's legislative history. *Id.* at 523-24. Second, the Court determined that the "goals and objectives" of the Copyright Act are not similar to those of the civil rights statutes. *Id.* at 524. The Court noted, for example, that many civil rights plaintiffs are "impecunious" and that Congress intended to "redress the balance in part" between poor plaintiffs and "defendants with more resources" "by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney fees" -- and thereby encourage the filing of more civil rights suits. *Id.* In contrast, the Court noted, Copyright Act plaintiffs are far less likely than civil rights plaintiffs to be poor; "[e]ntities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists." *Id.* Also, the Court noted that while the overriding goal of the civil rights statutes is to maximize the number of meritorious suits filed by injured plaintiffs, "the policies served by the Copyright Act are more complex, more measured." *Id.* at 526. The Court said that the Act "ultimately serves the purpose of enriching the general public through access to creative works," and that that purpose is best served not by encouraging numerous infringement suits but by ensuring that "the boundaries of copyright law [are] demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 527.

The rationales that led *Fogerty* to decline to apply the *Christiansburg* dual standard in Copyright Act cases are equally applicable in the environmental law context. First, the legislative history of EPCRA contains no suggestion that Congress -- despite its clear statutory language suggesting an

evenhanded approach -- intended to adopt a dual standard in fee awards. Indeed, the legislative history of related environmental laws suggests just the opposite. Second, the goals and objectives of the citizen suit provisions of EPCRA and other environmental statutes are not at all similar to those of the civil rights statutes; those goals and objectives are not compatible with the dual standard adopted by the appeals court.

1. The Legislative History of EPCRA and Related Environmental Statutes Does Not Support Adoption of a Dual Standard

The fee provision at issue in *Christiansburg* was 706(k) of Title VII of the Civil Rights Act of 1964, which permits district courts in their discretion to "allow the prevailing party . . . a reasonable attorney's fee." The Court relied on § 706(k)'s legislative history to conclude that § 706(k) -- despite its seemingly neutral language -- mandated a dual fee-award standard. *Christiansburg,* 434 U.S. at 420. Noting that Congress adopted § 706(k) to encourage the filing of meritorious Title suits, the Court stated that granting attorney fees to prevailing Title VII defendants on a routine basis would undercut that purpose because it "would substantially add to the risks inherent in most litigation." *Id.* at 422.

CBE has been unable to point to *any* provision in EPCRA's legislative history indicating that EPCRA's fee-shifting provision was similarly designed to maximize the number of citizen suits. The legislative history of other environmental statutes suggests that fee-shifting provisions were added as a means of assisting prospective *defendants*, not prospective plaintiffs. Indeed, in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Court arrived at precisely that conclusion regarding the fee-shifting provision of the Clean Air Act Amendments of 1970, the first environmental statute

to include a fee-shifting provision. After reviewing the legislative history of the Clean Air Act, the Court concluded:

> The central purpose of § 304(d) [the Clean Air Act's fee-shifting provision] was to check the multiplicity of potentially meritless suits, that Congress feared would follow the authorization of [citizen] suits under the Clean Air Act, which was seen as an unprecedented innovation.

Ruckelshaus, 463 U.S. at 692-93 (internal quotations omitted).

Because the "central purpose" of fee-shifting provisions in environmental statutes is to cut down on the number of meritless citizen suits being filed, such provisions cannot fairly be interpreted as favoring plaintiffs over defendants. As the Court has noted, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits." *Id.* at 693.

2. The Goals and Objectives of EPCRA Do Not Support Adoption of a Dual Standard

Christiansburg's determination that a dual standard should be applied to fee awards in civil rights cases was based in large measure on the goals and objectives of the civil rights laws. The goals and objectives of the EPCRA citizen suit provision and other environmental law citizen suit provisions are far different from those of Title VII and other civil rights laws, and do not provide any basis for incorporating *Christiansburg*'s dual standard into the environmental sphere.

The Court's principal justification for adopting a dual fee-award standard in cases brought by individuals under Title VII was its perception that the plaintiff in such suits "is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Christiansburg*, 434 U.S. at 418 (citation omitted). The Court explained that

the special role filled by Title VII plaintiffs justified adoption of a dual standard on fee-award issues as a means of encouraging suits by all plaintiffs with meritorious Title VII claims. *Id.* at 416-19.

That rationale for adopting a dual fee-award standard is inapplicable to plaintiffs bringing citizen suits under EPCRA or other environmental statutes. Such plaintiffs are *not* Congress's "chosen instrument[s]" for enforcing EPCRA. Rather, Congress placed primary enforcement responsibility on the federal government, which was given the power to seek criminal, civil, or administrative penalties against facilities that neglect their reporting responsibilities. 42 U.S.C. § 11045. *Steel Co. v. CBE*, 523 U.S. at 87 (the "most powerful [EPCRA] enforcement arsenal" belongs to the federal government). States and local governments also have significant enforcement powers. 42 U.S.C. § 11046(a)(2) and (c).

Citizen suits were assigned a secondary role in the EPCRA enforcement matrix -- as evidenced by a statutory provision barring citizen suits if the federal government decides to bring its own enforcement action. Indeed, anyone contemplating an EPCRA citizen suit must provide 60 days' advance notice of the suit to the federal government, the State in which the alleged violation is occurring, and the alleged violator. 42 U.S.C. § 11046(d)(1). That notice requirement provides the federal government an opportunity to investigate the complaint and to decide whether to bring its own enforcement action. If after investigating the complaint, the federal government decides to pursue EPCRA enforcement action, the prospective citizen-plaintiff is barred from bringing suit. 42 U.S.C. § 11046(e).

Many other federal environmental statutes contain 60-day notice provisions and exclusive-federal-enforcement provisions similar to EPCRA's. Such provisions have been interpreted by the Court on at least two occasions as evidence both that Congress viewed the federal government as the

principal enforcer of the environmental law at issue and that Congress wished to avoid excessive numbers of citizen suits. In *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), the Court relied on the 60-day notice requirement and the exclusive-federal-enforcement mandate in the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(f), to hold that individuals could not sue for wholly past violations of the Act. The Court explained:

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. . . . Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit.

Gwaltney, 484 U.S. at 60. Similarly, the Court held that the 60-day notice requirement of the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(b)(1), imposes an absolute bar to suit by individuals who have failed to comply with its terms. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The Court held that requiring compliance with the 60-day notice requirement "allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and thereby serves Congress's intent "to strike a balance between encouraging citizen enforcement of environmental regulations and *avoiding burdening the federal courts with excessive numbers of citizen suits*." *Id.* at 29 (emphasis added).

Moreover, Congress declined to give private citizens any personal monetary stake in their EPCRA enforcement actions. While prevailing plaintiffs in civil rights actions are eligible for substantial damage awards, Congress specified that any civil penalty imposed on the defendant in an EPCRA citizen suit would be paid to the federal government, not the plaintiff. 42 U.S.C. § 11046(c). The absence of any "bounty"

provision in EPCRA is inconsistent with a claim that citizen-suit plaintiffs are Congress's "chosen instrument[s]" for EPCRA enforcement.

In sum, while encouraging meritorious EPCRA citizen suits was obviously one reason that Congress provided for the award of attorney fees to prevailing parties in such suits, the principal factor that led the Supreme Court in *Christiansburg* to adopt a dual fee-award standard in Title VII cases -- a recognition that Title VII plaintiffs are Congress's "chosen instrument" for eradicating invidious discrimination in the workplace -- is wholly absent from EPCRA citizen suits.

Another consideration that animated *Christiansburg's* decision to adopt a dual fee-award standard was a recognition that most civil rights plaintiffs are individuals of limited means (*Christiansburg*, 434 U.S. at 420) who would face financial disaster if forced to pay attorney fees to a prevailing defendant. The Court recognized that, due to those potential financial consequences, placing prevailing defendants' fee petitions on an equal footing with those of prevailing plaintiffs would largely negate the intent of fee-shifting provisions to encourage the filing of meritorious civil rights claims:

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.

Id. at 422.

The impoverished-plaintiff scenario envisioned by *Christiansburg* as the rationale for a dual fee-award standard in civil rights cases is of little relevance in environmental citizen-suit litigation, where the typical plaintiff is a well-established environmental group that brings numerous such actions. CBE fits that description precisely. In 1995, CBE had over 30,000 members and 180,000 contributors.

Complaint ¶ 6. According to one of its publications, CBE has successfully prosecuted numerous suits under EPCRA and other federal environmental statutes. Citizens for a Better Environment, *Environmental Review* (Fall 1997).

An examination of reported decisions under environmental citizen-suit statutes demonstrates that virtually no plaintiffs in such cases are individuals. For example, citizen suits brought under EPCRA against non-governmental defendants have resulted in reported decisions in nine cases. In eight of those cases, the plaintiff was an environmental organization.[8] Only one of those cases was filed on behalf of an individual.[9] One environmental group, the Atlantic States Legal Foundation, brought three of the nine cases.[10] An EPA

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[8] In addition to this case, the other seven are *Atlantic States Legal Found. v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995); *Neighbors for Toxic-Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448 (D. Colo. 1997); *Idaho Sporting Congress v. Computrol*, 952 F. Supp. 690 (D. Id. 1996); *Don't Waste Arizona v. McLane Foods*, 950 F. Supp. 972 (D. Az. 1996); *Atlantic States Legal Found. v. Buffalo Envelope Co.*, 823 F. Supp. 1065 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); and *Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991).

[9] *Williams v. Leybold Technologies*, 784 F. Supp. 765 (N.D. Cal. 1992).

[10] A Westlaw party search revealed that 45 of the citizen suits brought by Atlantic States Legal Foundation (ASLF) under a variety of environmental statutes since 1984 have resulted in reported court decisions. ASLF claims to have litigated "hundreds of successful EPCRA and Clean Water Act cases." Samuel H. Sage and David W. Clippinger, *Holding Business Accountable*, POLLUTION PREVENTION REVIEW (Spring 1996) at 65. It also claims, "ASLF pioneered citizen enforcement of EPCRA in 1989 and remains the only public interest group in the country that routinely and systematically pursues EPCRA (continued...)

study of intent-to-sue letters filed under the Clean Water Act's citizen suit provision between May 1984 and September 1988 revealed that two-thirds were filed by large environmental organizations; between 1982 and April 1984, five national organizations accounted for 80% of all such notices. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 353-54 (1990). As the Supreme Court noted in *Hallstrom*, "While the initial charge in a Title VII proceeding is normally filed by an aggrieved individual, . . . citizen suits under RCRA are like any other lawsuit generally filed by trained lawyers who are presumed to be aware of statutory requirements." *Hallstrom*, 493 U.S. at 28.

The possibility that an adverse judgment could result in such organizations having to pay the opposing party's attorney fees is unlikely to deter them from filing meritorious environmental lawsuits.[11] To illustrate the point, assume that

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[10](...continued)
violators." *Id.* at 64.

[11] *Fogerty* cited the absence of the impoverished-plaintiff scenario in the typical copyright action as a reason for refusing to expand *Christiansburg*'s dual fee-award standard to copyright actions. The Court explained:

> Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. . . . In the copyright context, it has been noted that entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants.

(continued...)

a plaintiff concludes that his contemplated lawsuit has an 80% chance of success, and that the statute under which he plans to sue has a fee-shifting provision. A suit with that high a likelihood of success clearly would qualify as one that Congress intended to encourage. But if a civil rights plaintiff of modest means faced the prospect that he would have to pay the defendant's legal bills if he lost the case, he might well decide not to sue -- he would be reluctant to risk his life savings no matter how strongly he believed in his case. On the other hand, an environmental group that regularly litigates is able to spread the risk of an adverse fee award over a large number of cases. If an evenhanded fee-award standard were adopted in environmental cases, then an environmental group that only brought cases it accurately judged to have an 80% chance of success would likely have at least four fee awards go in its favor for every one that went against it.

Thus, if an evenhanded standard were adopted, the fee-shifting provisions of EPCRA and other environmental laws would still provide a substantial monetary incentive for the filing of meritorious citizen suits. Of course, an evenhanded standard would eliminate all incentive to file suits that the plaintiff calculates as having a less-than-50-percent chance of success; but there is nothing in EPCRA or its legislative history to suggest that Congress intended to encourage such suits. In fact, limiting citizen suits to those with a better-than-50% chance of success advances the congressional goal that citizen suits "supplement" federal enforcement and not "overly burden" the federal judiciary, as articulated by the Court in *Gwaltney* and *Hallstrom,* respectively.

In sum, the *Christiansburg* Court's fear that adoption of an evenhanded fee-award standard would discourage would-be

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[11](...continued)
Fogerty, 510 U.S. at 524 (citation omitted).

civil rights plaintiffs of limited means has no bearing on environmental cases -- where virtually all plaintiffs are environmental groups that can spread the risk of loss over a large number of cases. The Court should grant review in order to address whether these stark differences between civil rights cases and environmental citizen suits mandate adoption of differing fee-award standards.

III. THE DUAL FEE-AWARD STANDARD HAS TRANSFORMED CITIZEN SUITS FROM THE SUPPLEMENTAL ENFORCEMENT MECHANISM ENVISIONED BY CONGRESS INTO A SYSTEM UNDER WHICH COMPANIES ARE FORCED TO PAY TRIBUTE TO ENVIRONMENTAL GROUPS AS A COST OF DOING BUSINESS

As noted above (*supra* 5-6, 21-24), Congress placed primary responsibility for enforcement of EPCRA in EPA's hands, with citizen plaintiffs relegated to a much smaller, secondary role. Indeed, as the Court explained in *Ruckelshaus,* Congress added attorney fee provisions to environmental citizen suit statutes at the behest of those who feared that companies might become overwhelmed by environmental citizen suits; attorney fee provisions were seen as a means of reducing the number of unmeritorious suits. *Ruckelshaus*, 463 U.S. at 692-93.

Adoption of a dual fee-award standard has had precisely the opposite effect from that intended by Congress. The standard has provided environmental groups with financial incentives to file numerous suits of even doubtful merit. Under the dual standard, those groups can rest assured that they will never be assessed fees for filing unmeritorious lawsuits, provided only that they can demonstrate that the suit was not "frivolous"; and they stand to be handsomely rewarded if they prevail. Defendants in such actions face a

vastly different set of financial incentives. If they contest what they view as unmeritorious citizen suits, they will incur substantial fees with little hope of recovering them even if they ultimately prevail. Moreover, there is always some risk that they will not prevail; accordingly, contesting the suits also risks the possibility that they will have to pay a substantial fine to the government as well as the environmental group's mounting fees. Thus, the dual standard places enormous pressure on defendants to settle environmental citizen suits, regardless how unmeritorious they view the suits to be. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 120 S. Ct. 693, 719 (2000) (Scalia, J., dissenting) ("The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power--which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing.").

Numerous commentators have recognized that the environmental citizen suit regime has ceased being the supplemental enforcement mechanism envisioned by Congress. *See, e.g.*, Greve, *supra* at 339-45; Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11-SPG NAT. RESOURCES & ENV'T 20 (Spring 1997). Rather, there has been an "explosion" in the number of citizen suits over the past 15 years, fueled in no small degree by the dual fee-award standard that has resulted in the award of fees to prevailing plaintiffs as a matter of course. *Id.* As a result, a cottage industry has sprung up consisting of lawyers and affiliated environmental groups dedicated almost exclusively to -- and largely financed by fees derived from -- bringing such suits. *Id.*

The financial incentives created by the dual fee-award system has operated as one would expect: the great majority of environmental citizen suits are settled relatively quickly, with corporate defendants agreeing to make some form of

payment. Greve, at 355. Such payments generally include not only the plaintiff's attorney fees but also a cash payment to an environmental project of the plaintiff's choosing. *Id.* at 356.[12] While environmental groups, to avoid appearances of impropriety, have been unwilling to specify that the cash payment be made to the plaintiff, they have generally specified that the payments be made to an allied environmental group. *Id.* at 358-59.[13]

The Steel Company submits that the citizen suit regime outlined above -- which amounts to a large transfer payment from private industry to environmental groups with little evidence of benefit to the environment -- is not the one envisioned by Congress. There is considerable evidence that the current state of affairs has been brought about in large measure by judicial adoption of the dual fee-award system. Review is warranted in this case to determine whether adopting an evenhanded fee-award standard would correct the imbalance.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Citizen suit defendants have generally been willing to make such payments as an alternative to the fine they would be required to pay to the federal government if found by the court to have violated an environmental statute. *Id.* at 356-57. Such payments generally are an attractive alternative because in practice they are considerably smaller than the potential fine and because, unlike a fine, they are tax deductible. *Id.*

[13] For example, the Atlantic States Legal Foundation, in reporting on its successful settlement of an EPCRA citizen suit against Silgan Containers Corp., stated that one of the settlement terms required Silgan to make a cash payment to Respondent Citizens for a Better Environment "for further pollution prevention work." Sage and Clippinger at 66.

Respectfully submitted,

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Dated: January 16, 2001

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-2709
Citizens for a Better Environment,
Plaintiff-Appellee,

v.

The Steel Company, also known as
Chicago Steel and Pickling Company,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 4534--George M. Marovich, Judge.

Argued February 9, 2000--Decided October 17, 2000

Before Bauer, Easterbrook, and Ripple, *Circuit Judges*.

Easterbrook, *Circuit Judge*. The Steel Company missed reporting deadlines established by the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-50. Notified of its default by Citizens for a Better Environment (CBE), The Steel Company quickly furnished all required documents. Nonetheless CBE filed suit under the Act's citizen-suit provision. 42 U.S.C. § 11046(a)(1). The Act authorizes a civil penalty of $25,000 per day per report for tardiness, 42 U.S.C. § 11045(c), and by the

complaint's calculations The Steel Company could have owed more than $537 million. The Steel Company replied that CBE is not entitled to pursue such a claim. A panel of this court rejected this argument without discussing CBE's standing, 90 F.3d 1237 (7th Cir. 1996), but the Supreme Court unanimously reversed. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Six Justices concluded that, even if delay in disclosure injured CBE, that injury could not be redressed given that any civil penalty would be paid to the United States rather than a private plaintiff; CBE therefore lacks a justiciable controversy with The Steel Company. 523 U.S. at 102-10. Three Justices concluded that Congress has authorized citizen suits only if the litigation begins before the firm files all required reports; these three did not decide whether CBE has standing. *Id.* at 131-34 (Stevens, J., joined by Souter & Ginsburg, JJ.).

It took three years and $270,000 in attorneys' fees for The Steel Company to convince the federal judiciary that CBE was whistling in the dark. After the Supreme Court's decision, we know that this suit never should have been filed. Now The Steel Company wants to be placed in the pecuniary position it would have occupied but for the suit. Accordingly, it moved in the district court for an award of attorneys' fees under § 11046(f), only to be told "no jurisdiction." 1999 U.S. Dist. Lexis 9042 (N.D. Ill. June 8, 1999). Though those words were music to its ears when sung by the Supreme Court, The Steel Company insists that this repeat is not in the score.

The district court thought that, if CBE lacks standing to seek civil penalties from The Steel Company, then The Steel Company must lack standing to seek attorneys' fees

from CBE. A court either has jurisdiction or it doesn't, the district judge believed, and the Supreme Court has put this case in the no-jurisdiction cubbyhole. Yet "[c]ourts that lack jurisdiction with respect to one kind of decision may have it with respect to another. See *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077-79 (7th Cir. 1987). A court, for example, always has jurisdiction to consider its own jurisdiction". *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988) (Breyer, J.). See also *Yang v. INS*, 109 F.3d 1185, 1192-94 (7th Cir. 1997). In particular a court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party. We held this in *Szabo Food Service*, and the Supreme Court agreed in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). In this very case the Supreme Court granted certiorari, held a hearing, and considered whether federal courts had jurisdiction to entertain the suit. The Court said no, and it had jurisdiction to say no. Article III of the Constitution authorized the proceedings in which the Court gave its answer. Article III allowed this court on remand to direct that the district court dismiss the suit. Article III allowed taxation of costs against CBE pursuant to 28 U.S.C. § 1919 in the Supreme Court and here on remand. Article III allows an award of other costs of litigation, including attorneys' fees, incurred in the proceedings. Although CBE lost because the judiciary could not redress any injury it suffered from The Steel Company's delay in filing the required reports, The Steel Company's injury (the costs of defending this litigation) assuredly may be redressed by an order requiring CBE to reimburse those expenses. That satisfies Article III. The Steel Company has only to

establish that federal law authorizes the district court to make the award.

The district court's conviction that it may not award attorneys' fees reflects a misunderstanding of what the Supreme Court said in this litigation about Article III. The Court concluded that CBE's prospect of recovering costs and legal fees if it prevailed on the merits could not justify adjudicating the question whether The Steel Company had violated the Act. "[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." 523 U.S. at 107. But a fee award *is* the substantive issue in The Steel Company's motion. It has been injured in fact to the tune of $270,000 and counting. CBE's suit inflicted that injury, which can be redressed by an award in The Steel Company's favor. Malicious prosecution and abuse of process are very old torts that reflect a defendant's entitlement to be made whole following wrongful litigation--including litigation so baseless that it does not even come within the jurisdiction of the court in which it was filed. Suppose a federal statute established the right to recover for loss caused by "wrongful invocation of federal jurisdiction," affording compensatory damages to defendants who have been dragged pointlessly through federal court. The constitutionality of such a provision could not be doubted, nor would anyone deny that the aggrieved former defendant has standing to avail itself of the federal right so created. Cf. 28 U.S.C. §§ 1495, 2513 (granting such a remedy to a criminal defendant who can establish innocence). That the aggrieved litigant invoked its entitlement by counterclaim rather than by an independent suit would not deprive the district court of authority to supply the remedy.

Until 1875 federal courts did not award either attorneys' fees or any other costs in cases that had been dismissed for want of jurisdiction. The reason lay in the common law, not the Constitution, the Court explained in *Mansfield C. & L.M. Ry. v. Swan*, 111 U.S. 379, 386-87 (1884). In considering the power conferred on circuit courts by the Act of March 3, 1875, 18 Stat. 470, 472, to award costs secured by a bond when remanding a suit to state court, the Court observed: "These provisions were manifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs." *Id.* at 387. *Mansfield* applied the new statute and held that costs may be awarded even when the court to which the action is removed lacks jurisdiction to decide the merits. The law applied in *Mansfield* is still on the books, now split into two and modified. One part appears in 28 U.S.C. § 1919:

> Whenever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs.

The other survives as 28 U.S.C. § 1447(c):

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

We applied this statute in *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000), stating that attorneys' fees should be normal incidents of remands for lack of jurisdiction; none of the parties suggested that § 1447(c) violates Article III, and such a contention would have been untenable. Use of this fee-shifting power has been uncontroversial. See, e.g., *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992); *Mints v. Educational Testing Service*, 99 F.3d 1253 (3d Cir. 1996); *W.H. Avitts v. Amoco Production Co.*, 111 F.3d 30 (5th Cir. 1997); *Stallworth v. Greater Cleveland RTA*, 105 F.3d 252 (6th Cir. 1997).

Willy noted that statutes such as § 1919 and 1447(c) permit awards of litigation expenses in suits that federal courts are not authorized to decide on the merits. *Cooter & Gell* held that Fed. R. Civ. P. 11 permits such awards in cases originally within the court's jurisdiction but voluntarily dismissed by plaintiffs before defendants seek fees. Then *Willy* generalized that approach by holding that attorneys' fees may be awarded under Rule 11 even if the case never came within the district court's subject-matter jurisdiction. The district court sought to distinguish these decisions:

> [A] court's authority to award attorney's fees or sanctions under Rule 11 is drawn not from the Constitution's Article III jurisdictional requirements, but rather congressional authority under Article I, § 8, cl. 9 to establish laws regulating the conduct of the courts. *Willy*, 503 U.S. at 136. The imposition of Rule 11 sanctions therefore is a procedural matter that is not restricted by Article III standing requirements. Here, the procedural concerns regarding abuse of the judicial system present in both *Willy* and *Cooter & Gell* are

> notably absent. As such, the Supreme Court's Rule 11 jurisprudence is not germane.

This passage confuses two concepts--legislative authority to create rights and remedies (located in Article I), and adjudicative authority (located in Article III). Article I conferred on Congress authority to enact not only 28 U.S.C. §§ 1919 and 1447(c), but also the Rules Enabling Act, 28 U.S.C. §§ 2071-77, which underpins Rule 11. That laws are enacted under Article I does not justify dispensing with standing requirements under Article III; courts possess no more authority to issue advisory opinions (or otherwise exceed their jurisdiction) in "procedural matters" than in other matters. Still, a motion seeking an award under any of these rules or statutes is a case or controversy that may be adjudicated to the extent the movant has suffered at its adversary's hands an injury [that] may be redressed by a decision in its favor. *Steel Co.*, 523 U.S. at 102-04. Article III therefore presents no obstacle to fee-shifting, whether or not the fees were incurred in proceedings that were cases or controversies under Article III. To see this, consider costs and attorneys' fees incurred in proceedings before administrative agencies. That the agency proceedings were not conducted under Article III does not preclude awards of costs and fees to the prevailing party, when legislation authorizes litigation to recoup those outlays. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (federal suit to recover legal expenses of state administrative and judicial proceedings enforcing Title VII of the Civil Rights Act of 1964); *Brown v. Griggsville Community Unit School District No. 4*, 12 F.3d 681 (7th Cir. 1993) (federal suit to recover attorneys' fees necessitated by state administrative proceedings under the IDEA). Not all statutes authorize claims of this kind; *North Carolina*

Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6, 13-15 (1986), held that 42 U.S.C. sec.1988, unlike Title VII, does not support a suit whose sole object is to recover legal expenses incurred in nonjudicial proceedings. But this is a matter of statutory meaning, not of power to adjudicate, a distinction that the Supreme Court emphasized in this very case. 523 U.S. at 89-90.

The district court drew comfort for its position from decisions of other circuits. *Ass'n for Retarded Citizens v. Thorne*, 68 F.3d 547, 552 (2d Cir. 1995) (relying on *W.G. v. Senatore*, 18 F.3d 60 (2d Cir. 1994)); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990); and *Branson v. Nott*, 62 F.3d 287, 292-94 (9th Cir. 1995), hold that defendants cannot obtain awards of fees under § 1988 if the district court lacked subject-matter jurisdiction. *Branson* conceded that "there are some circumstances in which attorney's fees or costs may be imposed even where the court proves to be without subject matter jurisdiction" (62 F.3d at 293 n.10, citing 28 U.S.C. §§ 1919 and 1447(c)) but did not attempt to distinguish those provisions from § 1988. The other two decisions have even less reasoning. Yet before *Thorne, Branson*, and *Keene*, this circuit had reached a contrary conclusion. See *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988). In *Charles* the Supreme Court concluded that a would-be appellant lacked standing, knocking out jurisdiction over an appeal. *Diamond v. Charles*, 476 U.S. 54 (1986). Then we ordered the party who had caused the unnecessary proceedings to pay the other side's costs and attorneys' fees under § 1988. *Thorne, Branson, Keene* and the district court all neglected *Charles* and its predecessors, including *Sanders v. CIR*, 813 F.2d 859 (7th Cir. 1987), and *Moten v. Bricklayers International*

Union, 543 F.2d 224 (D.C. Cir. 1976). *Sanders* concluded that because a court has jurisdiction to determine its own jurisdiction, the Tax Court may award attorneys' fees in a proceeding that it is not authorized to decide on the merits; *Moten* reached a similar conclusion under the fee-shifting provision in 42 U.S.C. § 2000e-5(k). Although the district court in *Charles* had jurisdiction, as the district court here did not, the award of fees dealt with proceedings on appeal, proceedings that were not properly initiated because the appellant lacked standing, and there was accordingly no case presented for decision on the merits. If an award of fees was within the court's jurisdiction in *Charles*, it is equally within the court's jurisdiction here. Nothing in *Thorne, Branson, Keene*, or the district court's opinion persuades us that *Charles* or *Sanders* should be limited or overruled.

The final appellate decision on which the district court relied does not support its decision. *Cliburn v. Police Jury Association of Louisiana, Inc.*, 165 F.3d 315 (5th Cir. 1999), held that the language of a particular fee-shifting provision, properly construed, does not authorize awards to defendants when the underlying suit is outside federal jurisdiction. The provision at issue reads:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1). The fifth circuit concluded (165 F.3d at 316):

> The district court's dismissal of Cliburn's claims for lack of subject matter jurisdiction is inconsistent with an award of fees and costs under a statute which requires "any action under this subchapter." In dismissing Cliburn's suit, the district court determined that there was no ERISA "action." Furthermore, given that ERISA is inapplicable to Cliburn's claims, it is inconsistent to conclude that either Cliburn or the Police Jury Association is "a participant, beneficiary, or fiduciary" eligible to invoke § 1132(g)(1). Given that the district court lacked jurisdiction to hear Cliburn's claims under ERISA, it logically follows that the court lacked jurisdiction to entertain the Police Jury Association's request for fees, costs, and expenses under ERISA.

We have no quarrel with this conclusion, but it does not shed light on the application of 42 U.S.C. § 11046(f), which provides:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

Does this cover The Steel Company's request? CBE has not advanced an argument along Cliburn's lines that The Steel Company's motion for fees did not ask the district court for an award "in issuing any final order in any action brought pursuant to this section". CBE's action was "brought pursuant to" § 11046; it could not have been brought under any *other* law, and the suit's failure did not make it the less

one "brought pursuant to" § 11046. See *Steel Co.*, 523 U.S. at 92-93. CBE does, however, make two other statutory arguments against application of § 11046(f), the first of which focuses on the words "prevailing party". Has The Steel Company "prevailed" in this litigation?

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792 (1989), concluded that a plaintiff prevails for purposes of 42 U.S.C. § 1988 only if "at a minimum . . . the plaintiff [can] point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Alternatively, the Court wrote, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties" (489 U.S. at 792-93). We may assume that § 11046(f) uses "prevailing party" in the same way. If a plaintiff prevails by securing a change in legal relations, then a defendant prevails by securing an entitlement not to have any change in legal relations. If a plaintiff prevails by an award of damages or an injunction, the defendant prevails by securing a declaration that it need not pay damages or alter its behavior. Defeating a plaintiff on the merits is one way to obtain such assurance, but hardly the only way. A declaration that the plaintiff and others like it are not even entitled to sue accomplishes the same end, and more. The Steel Company could have "prevailed" by obtaining a declaration that it need not pay a penalty for this particular delay; instead it obtained from the Supreme Court much more--a decision foreclosing any private plaintiff from suing about this delay or any other. This is the most sweeping victory for which it could have hoped.

Sometimes victory on a jurisdictional point merely prolongs litigation. A defendant may persuade the court

that the plaintiff has sued too soon, or in the wrong court, or failed to jump through a procedural hoop. Then the dispute will continue later, or elsewhere, and it remains to be seen who will prevail. Such a victory is like persuading a judge to deny summary judgment, a step that transfers decision to a jury but does not end the litigation in defendant's favor and therefore does not make it a prevailing party. See *Hanrahan v. Hampton*, 446 U.S. 754 (1980); cf. *Shalala v. Schaefer*, 509 U.S. 292, 300-02 (1993). But the Supreme Court's decision in this case did not just put off the evil day for The Steel Company. It terminated this suit and barred all others like it, for as long as the statute retains its current language. It was a triumph in the war, not just in a battle or even a campaign.

The alternative of limiting "prevailing" to "prevailing on the merits" has nothing to recommend it under either the text of the statute or the considerations that lie behind fee-shifting statutes. Although this approach has found favor in some other circuits--see, e.g., *Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 183 n.15 (3d Cir. 1999); *Keene*, 908 F.2d at 298; *Branson*, 62 F.3d at 293 (contra *Elks National Foundation v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991)); *GHK Exploration Co. v. Tenneco Oil Co.*, 857 F.2d 1388, 1391 (10th Cir. 1988)--this court has long been of the view that success on a fundamental jurisdictional point can make a litigant a "prevailing party". *Charles* is again our leading case.

Plaintiffs who had successfully challenged the constitutionality of a state law sought to recover attorneys' fees under § 1988 not only from governmental defendants but also from three private intervenors. The district court directed two of the intervenors to reimburse plaintiffs for

attorneys' fees they had incurred as appellees before the Supreme Court. The Court dismissed an appeal initiated by those intervenors after concluding that they lacked standing. In holding that appellees were prevailing parties in the Supreme Court proceedings, our panel observed that such parties should not be forced to "absorb the costs of defending lawsuits the appealing party lacked proper standing to bring." 846 F.2d at 1073. We see no reason in principle why a defendant that gets everything it desires after three tiers of litigation ending in a proclamation of "no jurisdiction" should have less entitlement to prevailing-party status than did the equivalently-successful appellees in *Charles*, who used a jurisdictional shield to retain what they had won in the district court. *Moten*, which we have already mentioned, also holds that a litigant may become a prevailing party by securing a jurisdictional victory of sufficient scope. And of course since 1875 courts have awarded costs to litigants that prevail on jurisdictional grounds, and did so in this very case--though under Fed. R. Civ. P. 54(d)(1) only a "prevailing party" recovers costs. We hold that when a dismissal for want of jurisdiction forecloses the plaintiff's claim, the defendant is the "prevailing party."

So much for CBE's first statutory argument. Its second is that The Steel Company is not entitled to fees, even as a "prevailing party," because § 11046(f) should be read to incorporate the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). According to *Christiansburg*, prevailing plaintiffs in civil-rights cases presumptively recover attorneys' fees, but an award should be made in favor of a prevailing defendant only if the suit was frivolous, unreasonable, or pursued in bad faith. CBE contends that the same standard should be used in environ-

mental statutes, including § 11046(f). The statute at issue in *Christiansburg*, 42 U.S.C. § 2000e-5(k), provides that a court may "in its discretion . . . allow the prevailing party . . . a reasonable attorney's fee"; *Christiansburg* prescribes how district judges must exercise that discretion. Because § 11046(f) also includes language conferring discretion on the judge (the "appropriate" phrase), CBE contends that discretion should be exercised with the same thumb on the scale in plaintiffs' favor. Borrowing from *Christiansburg* is far from inevitable. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), holds that another fee-shifting statute, one with language materially identical to § 2000e-5(k), must be applied to treat prevailing plaintiffs and prevailing defendants equally. *Fogerty* warns courts not to extend *Christiansburg* mechanically. See *Stomper v. Amalgamated Transit Union*, 27 F.3d 316 (7th Cir. 1994). But with respect to environmental laws the Court itself did this before *Fogerty*, and its approach controls here.

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 560 (1986), says that the fee-shifting provisions of environmental statutes that promote private enforcement should be applied "in the same manner" as § 1988, a statute covered by *Christiansburg*'s asymmetric approach. Although the issue in *Delaware Valley* was whether plaintiffs could recover for post-judgment expenses of monitoring compliance with a consent decree, the proposition that environmental fee-shifting laws should be governed by the same principles as fee-shifting under § 1988 formed the basis of the Court's disposition and therefore cannot be treated as dictum. The Steel Company has not identified any feature in the language or structure of § 11046(f) that distinguishes it from the statute in *Delaware Valley*. Indeed, in a follow-up decision, *Pennsylvania v.*

Delaware Valley Citizens' Council, 483 U.S. 711 (1987), the Court stated that its initial opinion had decided that "in awarding attorney's fees under § 304(d) [of the Clean Air Act] the courts should follow the principles and case law governing the award of such fees under 42 U.S.C. § 1988". 483 U.S. at 713 n. 1. A concurring opinion by Justice Thomas in *Fogerty*, 510 U.S. at 538, cited this passage as establishing that "we have construed similar attorney's fee provisions to impose a 'dual' standard of recovery". Until the Supreme Court suggests otherwise, this court must read "in the same manner" to mean just that. The Steel Company therefore is entitled to recover its legal expenses only if CBE's suit was frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent.

Misconceived this suit was. Frivolous it was not. A panel of this court held that CBE was entitled to proceed. The Solicitor General supported that decision before the Supreme Court. A suit strong enough to survive an appeal cannot be deemed frivolous, even if all nine Justices thought it unavailing. We recognize that CBE did not win in this court; all it secured was the right to litigate on the merits. (The district court had dismissed its suit for want of jurisdiction.) No one suggests that CBE's claim was frivolous on the merits, however, for The Steel Company concededly filed reports after the statutory deadlines. That's why The Steel Company needed to pitch its defense on jurisdictional grounds. Thus although we do not agree with the district court's reasons, we agree with its judgment: The Steel Company's request for fees was properly denied.

One last matter. The parties have squabbled over the content of The Steel Company's brief, and a motions judge ordered that CBE's motion to strike passages be taken with

the case. The Steel Company depicts itself as a small and struggling manufacturer and asserts that CBE is a well-heeled environmental juggernaut, while CBE asserts that this is not supported by the record and that it is David to The Steel Company's Goliath. This dispute is irrelevant to our decision. We have no wish to encourage parties to answer emotional appeals with demands that we scrutinize those passages for details. If CBE feared that an exercise in statutory interpretation would be subverted by misconceptions about the parties' relative wealth, it was free to reply in its own brief without asking us to take a red pencil to its adversary's. *Day v. Northern Indiana Public Service Corp.*, 164 F.3d 382 (7th Cir. 1999). Better still, litigants should give the judges some credit for ability to resolve legal issues in compliance with the oaths all of us have taken to "administer justice without respect to persons, and do equal right to the poor and to the rich" (28 U.S.C. § 453). The motion to strike is denied.

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. This case presents two intertwined, yet independent, issues that we must address: 1) whether the district court had jurisdiction to award attorneys' fees to The Steel Company; and 2) whether The Steel Company was entitled to attorneys' fees as a "prevailing party" under the Emergency Planning and Right-To-Know Act, 42 U.S.C. §§ 11001-50. My colleagues present a thoughtful analysis of these two issues. We are not in disagreement with respect to the result or with respect to the basic analysis. I agree that the district court had jurisdiction to award attorneys' fees, that The Steel Company meets the requirements for a prevailing party under the Act, but that fees are not appropriate in the present action by virtue of the rule set forth in

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). I write separately simply to emphasize how our decision today squares with our earlier precedent.

In my view, our court's analysis in *Szabo Food Service v. Canteen Corporation*, 823 F.2d 1073 (7th Cir. 1987), is especially helpful in understanding the scope of today's holding and in distinguishing it from other recent cases. In *Szabo Food Service*, this court identified the different meanings of "lack of jurisdiction." The first category we identified was "the image of subject matter jurisdiction." We stated:

> If one citizen of Illinois files a suit based on state law against another citizen of Illinois, a federal court lacks jurisdiction over the subject matter; so too if a plaintiff files a specious civil rights suit, for an absurd complaint does not even invoke federal question jurisdiction. Yet a court has jurisdiction to determine its jurisdiction and therefore may engage in all the usual judicial acts, even though it has no power to decide the case on the merits. It may supervise discovery, hold a trial, and order the payment of costs at the end. If the complaint is indeed too silly to create subject matter jurisdiction, attorneys' fees should be an ordinary incident of the award of costs.

Id. at 1077-78 (citations omitted). The second sense of "lack of jurisdiction" was when a court "has lost [its] power to proceed, even though the case is within the federal judicial power." *Id.* at 1078. This second jurisdictional category most often comes into play when a court has entered a final judgment; in those circumstances, a court loses its ability to consider the merits of the action, but does

"not also lose power to award attorneys' fees that may be in order as a result of what happened before the final decision." *Id.* at 1078. Finally, we discussed "a third 'jurisdictional' analogy [that] rests on the case or controversy requirement of Article III." *Id.* "When the plaintiff packs up his portfolio and goes home," we stated, "the case goes home with him. . . . Courts occasionally sum up the effect of the missing plaintiff by stating . . . : 'It is as if the suit had never been brought.' A court could not award attorneys' fees in a case that had never begun . . . ." *Id.* (citations omitted).

Our case law since *Szabo Food Service* has adhered to these categories. For example, in *Board of Education v. Nathan R.*, 199 F.3d 377 (7th Cir.), *cert. denied*, 68 U.S.L.W. 3775 (Oct. 2, 2000), we held that we could not consider an award of fees against a school corporation for deprivation of special education services when the action had been mooted by the student's graduation from high school. In those circumstances, "[b]ecause we would need to consider the merits to determine whether the Parents are prevailing parties, we agree[d] that we [could] not decide whether the Parents would be entitled to attorneys' fees from the proceedings in the district court." *Id.* at 381. In essence, we determined that a mooted case most closely resembles the third *Szabo Food Service* category; because we no longer had a controversy to decide, we could not determine issues, such as attorneys' fees, that were dependent upon our having decided the underlying controversy. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *see also Rhodes v. Stewart*, 488 U.S. 1 (1988).

The situation in the present case is more closely akin to the first *Szabo Food Service* category. Here, there is no question that the district court, this court, and the Supreme Court, had the authority to receive briefs, to hear argument, and to consider the issue of whether there was federal jurisdiction to resolve the merits of the underlying controversy; the courts involved had jurisdiction to determine their jurisdiction. From the authority to determine its jurisdiction necessarily flows the power of the court to award attorneys' fees based on the actions properly before it. Consequently, the district court had the authority to award fees arising from the actions of the parties in the course of resolving the jurisdictional issue. As my colleagues point out, this court's decision in *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), points the way.

The question remains, however, whether attorneys' fees are available to The Steel Company. This inquiry requires that we decide whether it has prevailed for purposes of the Act. With respect to this issue, as my colleagues point out, the decision of the Supreme Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), is instructive. In that case the Court addressed the issue of when a plaintiff might be considered a "prevailing party" for purposes of 42 U.S.C. § 1988. The Court stated that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92; *see also Hewitt v. Helms*, 482 U.S. 755 (1987). Here, CBE brought suit to collect fees from The Steel Company for failure to make required disclosures under the Act. The Steel Company, for its part, sought to prevent CBE from collecting those fees; one of the

bases upon which it defended the action was to challenge CBE's standing to bring the action. The Supreme Court agreed with The Steel Company that CBE lacked standing; its decision therefore foreclosed CBE's recovery of fees. In the words of the Supreme Court, The Steel Company prevailed on a "significant issue in litigation"--CBE's standing, which achieved for The Steel Company the only benefit that it could derive in defending the action. Consequently, The Steel Company is a prevailing party for purposes of the Act.

As my colleagues hold, however, our analysis does not end here. I agree with my colleagues that § 11046(f) incorporates the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and that standard precludes The Steel Company from recovering in the present action.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITIZENS FOR A BETTER ENVIRONMENT,	)	
Plaintiff,	)	95 C 4534
v.	)	Judge George M. Marovich
THE STEEL COMPANY, aka CHICAGO STEEL AND PICKLING COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On March 4, 1998, the United States Supreme Court determined conclusively that the federal courts lacked jurisdiction over Plaintiff Citizens for a Better Environment's ("CBE") Complaint against Defendant The Steel Company ("TSC") which alleged certain violations of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11046(a)(1). TSC has now filed a motion for attorney's fees and non-taxable expenses against CBE pursuant to § 326(f) of EPCRA, 42 U.S.C. § 11046(f). In response, CBE asserts that this Court lacks jurisdiction to consider TSC's motion. This Court agrees

and, therefore, denies TSC's motion for attorney's fees and non-table expenses.[1]

BACKGROUND

In 1995, CBE, an association of individuals interested in environmental protection, sued TSC, a small manufacturing company, for past violations of EPCRA. This Court granted TSC's motion to dismiss CBE's Complaint for lack of subject matter jurisdiction, the Seventh Circuit reversed that determination and the United States Supreme Court subsequently agreed to review the matter. The Court ultimately held that CBE lacked standing to maintain the suit, and both the Supreme Court and lower courts therefore lacked jurisdiction to consider it. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 118 S. Ct. 1003, 1009-1021 (1998). The Seventh Circuit subsequently remanded the case back to this Court with instructions to dismiss CBE's Complaint, and CBE's Complaint has been dismissed.

TSC now moves for an award of $270,208.61 in attorney's fees and non-taxable expenses under EPCRA's fee-shifting provision. *See* 42 U.S.C. § 11046(f). That statute provides that "the court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness

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[1] CBE has additionally "moved to dismiss and strike" TSC's motion pursuant to Fed. R. Civ. P. 12(b)(1), 12(f) & 12(h)(3). TSC correctly notes that such a motion may only be directed at a "pleading" and, therefore, CBE's motion is procedurally astray. Nevertheless, the Court has considered CBE's jurisdictional argument in the context of TSC's motion.

fees) to the prevailing party or substantially prevailing party whenever the court determines such an award is appropriate." *Id.* In response, CBE contends that because this Court lacked subject matter jurisdiction to consider its original Complaint, the Court similarly lacks jurisdiction to consider TSC's motion for attorney's fees and non-taxable expenses.

DISCUSSION

Federal district courts are vested with federal question jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. As the Supreme Court recently reiterated in this case:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. . . . The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.

Steel Co., 118 S. Ct. at 1003 (quotations and citations omitted). Consequently, this Court must address the threshold matter of whether it has jurisdiction to consider TSC's motion for attorney's fees and non-taxable expenses. The Court finds that it does not.

Initially, the fact that EPCRA authorizes courts the discretion to award attorney's fees does not, by itself, constitute an independent grant of jurisdiction. Indeed, the

Supreme Court has noted in this very case that "[a]n 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'" *Id.* at 1019 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Although the Supreme Court addressed this matter in the context of whether *CBE*'s interest in attorney's fees could establish jurisdiction, the Court's reasoning is equally applicable to TSC. In short, TSC's purported interest in attorney's fees under EPCRA cannot create an Article III case or controversy because no such case or controversy exists over the merits of the EPCRA claim.[2]

TSC alternatively argues that this Court has jurisdiction to consider the issue of attorney's fees because it may address the issues "collateral" to the underlying dispute. In support of this proposition, TSC relies predominately on a series of cases in which the Supreme Court allowed the imposition of Rule 11 sanctions when the district courts lacked jurisdiction over the original complaint. *See Cooter & Gell v. Hartma[r]x Corp.*, 496 U.S. 384 (1990); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992).

TSC's reliance on the Supreme Court's Rule 11 jurisprudence is misplaced. In *Willy*, the Court noted that the

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[2] This conclusion is consistent with courts which have held that they lacked jurisdiction to entertain motions for attorney's fees under fee-shifting provisions contained in other statutes where the court lacked subject matter jurisdiction over the underlying substantive claim. *See, e.g., Cliburn v. Policy Jury Assoc. of Louisiana,* 165 F.3d 315, 316 (5th Cir. 1999) (ERISA); *W.G. v. Senatore,* 18 F.3d 60, 64 (2d Cir. 1994) (Individuals with Disabilities Education Act); *Keene Corp. v. Cass,* 908 F.2d 293, 298 (8th Cir. 1990) (§ 1988); *Branson v. Nott,* 62 F.3d 287, 292 (9th Cir. 1994) (same).

decision to grant Rule 11 sanctions is wholly unrelated to a judgment on the merits but is instead concerned with the orderly procedure of the court. As such, a court's authority to award attorney's fees or sanctions under Rule 11 is drawn not from the Constitution's Article III jurisdictional requirements, but rather congressional authority under Article I, § 8, cl. 9 to establish laws regulating the conduct of the courts. *Willy,* 503 U.S. at 136. The imposition of Rule 11 sanctions therefore is a procedural matter that is not restricted by Article III standing requirements. Here, the procedural concerns regarding abuse of the judicial system present in both *Willy* and *Cooter & Gell* are notably absent. As such, the Supreme Court's Rule 11 jurisprudence is not germane.[3]

The additional cases which TSC cites in support of its argument for "collateral" matter jurisdiction are equally inapposite. Pivotally, in each of the cases cited by TSC, the court had original jurisdiction over the proceedings at some point and retained jurisdiction to consider collateral matters

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[3] Parenthetically, TSC argues that although both *Willy* and *Cooter & Gell* dealt with Rule 11 sanctions, the Court's reasoning in those cases was not restricted to Rule 11 situations. In particular, TSC argues that the Court in *Cooter & Gell* relied on cases that "had nothing whatsoever to do with Rule 11." (*See* Def. Supp. Resp. at 4, citing *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939); *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445 (1982); and *Bray v. United States,* 423 U.S. 73 (1975)). TSC, however, has failed to explain how the cases *Willy* and *Cooter & Gell* relied on have anything whatsoever to do with this case. In short, nothing in those cases or this Court's reading of *Willy* and *Cooter & Gell* suggests that the Supreme Court intended to extend its jurisdictional holding beyond the context of Rule 11 and, therefore, this Court declines TSC's invitation to expand the Supreme Court's holdings in those cases.

after its jurisdiction was divested. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (district court retained jurisdiction to consider attorney's fees issue after timely notice of appeal); *United States v. Kusay*, 62 F.3d 192, 193-94 (7th Cir. 1995) (same); *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 71 F.3d 1053 (2d Cir. 1995) (district court retained jurisdiction to consider attorney's fees issue after settlement); *Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 256-57 (6th Cir. 1997) (district court retained jurisdiction to consider attorney's fees issue under 28 U.S.C. § 1447(c) after remand). Unlike the above cases, this Court has never had jurisdiction over this dispute and, therefore, it cannot exercise jurisdiction "collaterally" now.

CONCLUSION

As explained above, this Court lacks jurisdiction to consider The Steel Company's motion for attorney's fees and non-taxable expenses. The Steel Company's motion is therefore denied. Citizens for a Better Environment's motion to dismiss and to strike is denied as moot.

ENTER:

GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT

DATED: June 8, 1999

APPENDIX C

42 U.S.C. § 11046. Civil Actions

(a) Authority to bring civil actions. (1) Citizen suits. Except as provided in subsection (e), any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 304(c) [42 U.S.C. § 11004(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 U.S.C. § 11021(a)].

(iii) Complete and submit an inventory form under section 312(a) [42 U.S.C. § 11022(a)] containing tier I information as described in section 312(d)(1) [42 U.S.C. § 11022(d)(1)] unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 U.S.C. § 11022(a)(2)].

(iv) Complete and submit a toxic chemical release form under § 313(a) [42 U.S.C. § 11023(a)].

(B) The Administrator for failure to do any of the following:

(i) Publish inventory forms under section 312(g) [42 U.S.C. § 11022(g)].

(ii) Respond to a petition to add or delete a chemical under section 313(e)(1) [42 U.S.C. § 11023(e)(1)] within 180 days after receipt of the petition.

(iii) Publish a toxic chemical release form under section 313(g) [42 U.S.C. § 11023(g)].

(iv) Establish a computer database in accordance

with section 313(j) [42 U.S.C. § 11023(j)].

(v) Promulgate trade secret regulations under section 322(c) [42 U.S.C. § 11042(c)].

(vi) Render a decision in response to a petition under section 322(d) [42 U.S.C. § 11042(d)] within 9 months after receipt of the petition.

(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 324(a) [42 U.S.C. § 11044(a)].

(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 312(e)(3) [42 U.S.C. § 11022(e)(3)] within 120 days after the date of receipt of the request.

(2) State or local suits. (A) Any State or local government may commence a civil action against an owner or operator of a facility for failure to do any of the following:

(i) Provide notification to the emergency response commission in the State under section 302(c) [42 U.S.C. § 11002(c)].

(ii) Submit a material safety data sheet or a list under section 311(a) [42 U.S.C. § 11021(a)].

(iii) Make available information requested under section 311(c) [42 U.S.C. § 11021(c)].

(iv) Complete and submit an inventory form under section 312(a) [42 U.S.C. § 11022(a)] containing tier I information unless such requirement does not apply by reason of the second sentence of section 312(a)(2) [42 U.S.C. § 11022(a)(2)].

(B) Any State emergency response commission or local emergency planning committee may

commence a civil action against an owner or operator of a facility for failure to provide information under section 303(d) [42 U.S.C. § 11003(d)] or for the failure to submit tier II information under section 312(e)(1) [42 U.S.C. § 11022].

(C) Any State may commence a civil action against the Administrator for failure to provide information to the State under section 322(g) [42 U.S.C. § 11042(g)].

(b) Venue. (1) Any action under subsection (a) against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

(2) Any action under subsection (a) against the Administrator may be brought in the United States District Court for the District of Columbia.

(c) Relief. The district court shall have jurisdiction in actions brought under subsection (a) against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in action brought under subsection (a) against the Administrator to order the Administrator to perform the act or duty concerned.

(d) Notice. (1) No action may be commenced under subsection (a)(1)(A) prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(2) No action may be commenced under subsection (a)(1)(B) or (a)(1)(C) prior to 60 days after the date on

which the plaintiff gives notice to the Administrator, State Governor, or State emergency response commission (as the case may be) that the plaintiff will commence the action. Notice under this paragraph shall be given in such manner as the Administrator shall prescribe by regulation.

(e) Limitation. No action may be commenced under subsection (a) against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this Act [42 U.S.C. §§ 11001 et seq.] with respect to the violation of the requirement.

(f) Costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) Other Rights. Nothing in this section shall restrict or expand any rights which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).

(h) Intervention. (1) By the United States. In any action under this section the United States or the State, or both, if not a party, may intervene as a matter of right.

(2) By persons. In any action under this section, any person may intervene as a matter of right when such person has a direct interest which is or may be directly affected by the action and the disposition of the action may, as a

practical matter, impair or impede the person's ability to protect that interest unless the Administrator or the State shows that the person's interest is adequately represented by existing parties in the action.